

CONGRESS OF THE UNITED STATES,

Washington, DC, June 18, 2008.

Re Complaint for Prosecutorial Misconduct  
Against Johnny Sutton, United States  
Attorney, Western District of Texas

H. MARSHALL JARRETT,

Counsel, Office of Professional Responsibility  
United States Department of Justice, Wash-  
ington, DC.

DEAR COUNSEL JARRETT: As Members of Congress, we write this letter to bring to your attention for investigation what we have concluded to be a serious miscarriage of justice by United States Attorney Johnny Sutton. Mr. Sutton supervised, and has vigorously defended, his office's actions in a case wherein two United States Border Patrol agents—Ignacio Ramos and Jose Alonso Compean—have been convicted, and each are now being punished by imprisonment of 10 years, for a crime that does not exist, and therefore, for a crime that could not have been committed.

Specifically, Mr. Ramos and Mr. Compean were charged with violating 18 United States Code Section 924(c)(1)(A) by the “knowing[] discharge[] [of] a firearm . . . during and in relation to a crime of violence.” (Emphasis added). There is, however, no such crime. Rather, Section 924(c)(1)(A) makes it a crime to “use or carry . . . during and in relation to any crime of violence” or to “possess a firearm” “in furtherance of” any such crime. And, as the United States Supreme Court recently pointed out, “discharge” is only a sentencing factor to be considered by the judge after conviction, not by the jury in the effort to determine whether the law has been violated. *United States v. Watson*, 169 L.Ed.2d 472 (2007).

While this distinction might, at first glance, be merely technical, the United States Court of Appeals for the Fifth Circuit, the circuit in which Mr. Ramos and Mr. Compean were convicted, ruled that an indictment that did not allege that a defendant had so used or carried, or so possessed, a firearm was insufficient to charge an offense under Section 924(c)(1)(A). See *United States v. McGilberry*, 480 F.3d 326, 329 (5th Cir. 2007). Indeed, six years before McGilberry, the Fifth Circuit, ruled that “discharging a firearm during and in relation to a crime of violence” was not an “actus reus” element of the offense defined by 18 U.S.C. Section 924(c)(1)(A), but only a factor to be considered at “sentencing” after conviction.” See *United States v. Barton*, 257 F.3d 433, 441–43 (5th Cir. 2001). And one year after Barton (and five years before Watson), the United States Supreme Court agreed, ruling that Section 924(c)(1)(A) did not define “discharge” of a firearm as a separate offense, but only as a “sentencing factor[] to be considered by the trial judge after conviction.” See *Harris v. United States*, 536 U.S. 545, 550–53 (2002).

Notwithstanding these binding precedents in the Western District of Texas, United States Attorney Sutton secured an indictment charging Mr. Ramos and Mr. Compean with the non-existent crime of “discharging” a firearm “in relation to a crime of violence.” By this charge Mr. Sutton facilitated the conviction of the two border control agents by means of jury instructions that focused the jury’s attention upon the “discharge” of the agents’ firearms, rather than upon the lawfulness of the possession, carrying, and use of such firearms in the ordinary course of their employment. Moreover, by this indictment and these instructions, Mr. Sutton obtained a conviction of an offense that carried a minimum 10-year sentence, as provided by the statute, rather than the lesser sentence for violation of Border Patrol rules and regulations. See also,

Brief Amici Curiae of Congressman Walter B. Jones, Gun Owners Foundation, United States Border Control Foundation, United States Border Control, and Conservative Legal Defense and Education Fund, Inc., In Support of Appellants, *United States of America v. Jose Alonso Compean and Ignacio Ramos*, No. 06–51489, U.S. Court of Appeals, Fifth Circuit (May 27, 2007).

It is our firm conviction that, by these actions, Mr. Sutton is guilty of prosecutorial misconduct, the effect of which has imposed an irreversible and substantial effect upon Mr. Ramos and Mr. Compean and their families. Prior to the return of the indictment against Mr. Ramos and Mr. Compean, Mr. Sutton must have known that it was impossible for there to be probable cause for a “crime” never enacted by Congress, as authoritatively and previously decided by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit. According to Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct, a prosecuting attorney is to “refrain from prosecuting . . . a charge that the prosecutor knows is not supported by probable cause.”

Indeed, the Comments to Rule 3.09 of the Texas Rules of Professional Conduct admonish prosecutors to remember their “responsibility to see that justice is done, and not simply be an advocate.”

On April 1, 1940, then Attorney General Robert Jackson, speaking to United States Attorneys serving in each federal judicial district across the country, reminded them why justice should be their goal, not winning their cases. “The prosecutor,” he said, “has more control over the life, liberty, and reputation than any other person in America. His discretion is tremendous . . . We must bear in mind that we are concerned solely with the prosecution of acts which the Congress has made federal offenses.”

Mr. Sutton has manipulated the federal criminal code to obtain a conviction against two U.S. Border Patrol agents, preferring to win at all costs over his duty as a United States Attorney, and his duty under the Texas Rules of Professional Conduct. This is a matter which your office has a duty to investigate and, on the basis of what we now know, to remedy.

Sincerely yours,

WALTER JONES,  
TED POE,  
VIRGIL GOODE,  
DANA ROHRBACHER,  
LOUIE GOHMERT,  
JOHN CULBERSON,  
DONALD A. MANZULLO,  
*Members of Congress.*

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Oregon (Mr. DEFAZIO) is recognized for 5 minutes.

(Mr. DEFAZIO addressed the House. His remarks will appear hereafter in the Extensions of Remarks.)

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Indiana (Mr. BURTON) is recognized for 5 minutes.

(Mr. BURTON of Indiana addressed the House. His remarks will appear hereafter in the Extensions of Remarks.)

#### OPERATION STREAMLINE

The SPEAKER pro tempore. Under a previous order of the House, the gen-

tleman from Texas (Mr. CULBERSON) is recognized for 5 minutes.

Mr. CULBERSON. Speaker CUELLAR, it's perfectly appropriate that you're in the chair today because you and I have served together in the Texas House, and we have worked together, Mr. Speaker, in cooperation with our friend, Congressman CIRO RODRIGUEZ of Del Rio. You and I and CIRO have worked together to successfully implement a program that I want to single out for praise tonight.

In the Laredo sector and the Del Rio sector, the immigration laws of this country are being enforced with a zero tolerance in a program called Operation Streamline. With the full support of the local community that you represent, Mr. Speaker, because the crime rate in Laredo has dropped 70 percent—excuse me; in Del Rio we have seen a 70 percent drop. I think you have seen about a 60 percent drop in the crime rate in the Laredo sector as a direct result of simply enforcing existing law in a team effort, Mr. Speaker, between the Border Patrol, the U.S. Marshals, the prosecutors, the judges, the magistrates, and the sheriffs, with their local Congressman, Congressman CUELLAR. You, Mr. Speaker, CIRO RODRIGUEZ, and myself on the Appropriations Committee, we have been able to bring together that team approach in a bipartisan way that has resulted in a dramatic decline in the crime rate. The illegal crossings in the Del Rio sector are now at the lowest level they have been since the Border Patrol started keeping statistics in 1973.

I bring this to the attention of the House tonight, Mr. Speaker, first of all, to congratulate and praise those fine men and women in the law enforcement community of the Border Patrol in Del Rio and Laredo, also in the Yuma sector, where this is working so well. In particular, in the Laredo and Del Rio sectors we have seen real success because of the teamwork of those law enforcement officers and the judges and the cooperation we have seen at an unprecedented level between members of both parties in making sure the community and the Nation are safe in those sectors.

I am working with you now, Mr. Speaker, as well as with the local Members of Congress in rolling out Operation Streamline, it's called, the zero tolerance program, in the Rio Grande Valley sector. So that the goal is, of course, from the mouth of the Rio Grande now, up through the Del Rio sector, Lake Amastad, that the border will be secure.

Unfortunately, Mr. Speaker, it is a very different story in Tucson, Arizona. In Tucson, Arizona, the local U.S. Attorney refuses to enforce existing law, and in Tucson, if you are arrested by the Border Patrol, for example, in Del Rio or Laredo, you have a 100 percent chance of being prosecuted and serving some time in jail, obviously